

### **III. IMPLEMENTATION OF FEDERAL PERMIT RULES RELATED TO SECTION 303(d) WATERS**

#### **BACKGROUND**

The section 303(d) list of impaired water identifies waters with water quality problems that will not be resolved through conventionally required treatment and require instead the development of a total maximum daily load (TMDL) analysis. These waters require special attention as permits are written for new or continuing discharges. To clarify how these requirements, found in 40 CFR 122.4, may be implemented, following are procedures to lend consistency, order and reasonable expectations as to how all parties involved can collectively deal with issues of new or expanded discharges to these waters.

Federal rules are specific in requirements that must be met in order to issue new permits that include contaminants that contribute to the impairment, or reissued or revised permits that would increase the loading of contaminants that contribute to the impairment, or exceed the TMDL. The salient part of the rule reads: “No permit may be issued...(h) for any discharge...in the following circumstances:...(i) to a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator...must demonstrate...that (1) there are sufficient remaining pollutant load allocations to allow for the discharge; and (2) the existing discharges into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.” No additional state rulemaking is necessary to implement these federal rules. Implementing this rule includes some procedural requirements to be satisfied in the permit process.

In general, the process of permit review for new or modified permits discharging to impaired waters will proceed as follows:

1. Is the subject facility of a permit application within a 303(d) watershed?  
If not, exit TMDL process and proceed with permit processing.  
If so, proceed to #2.
2. Is the facility discharging to the listed segment or upstream of it?  
If not, exit TMDL process and proceed with permit processing.  
If so, proceed to #3.
3. Would the facility contribute contaminants listed for the impaired water, or which would contribute to increased or continued impairment (e.g., low dissolved oxygen)?  
If not, exit TMDL process and proceed with permit processing.  
If so, proceed to #4.
4. Is there a TMDL established for that impaired water?  
If not, proceed to #5.  
If so, prepare the permit consistent with the TMDL and proceed to #6.

5. A. If the contaminants are degradable (e.g., bacteria, ammonia), can the permit be issued so that the effluent quality is better than the in-stream water quality standards?  
If so, include documentation and proceed with permit processing.  
If not, initiate the process of conducting conference, conciliation and persuasion to address the potential addition of listed contaminants to the impaired segment. If it is possible to revise the application so that a permit can be issued according to number three or five, proceed in that manner. If there is no alternative that would allow the permit to be issued, the applicant will be given the opportunity to withdraw the application with the fee refunded. If the application is not withdrawn, then deny the permit application with prejudice (indicating that the proposed facility and/or others must address the contaminants before the application could be acted upon).
  - B. If the contaminants are conservative (e.g., metals, sulfates, chlorides), can the permit be issued so that the effluent quality is not significantly different from the unimpaired background in that watershed?  
If so, include documentation and proceed with permit processing.  
If not, initiate the process of conducting conference, conciliation and persuasion to address the potential addition of listed contaminants to the impaired segment. If it is possible to revise the application so that a permit can be issued according to number three or five, proceed in that manner. If there is no alternative that would allow the permit to be issued, the applicant will be given the opportunity to withdraw the application with the fee refunded. If the application is not withdrawn, then deny the permit application. Indicate on the denial that the proposed facility and others must address the contaminants before the application could be resubmitted and acted upon.
6. If a TMDL has been completed, has the TMDL been incorporated into all other permits, as needed, within the watershed? Permits that would need this modification are those that authorize the discharge of the contaminant(s) causing the impairment in locations where it would contribute to the impairment. In general, these discharges are those within or upstream of the listed segment.

If the TMDL has been included in existing permits, then incorporate the TMDL based limits into the new permit and proceed to issue it.

If the TMDL has not been incorporated into existing permits, it may be possible to complete modification of those permits coincidentally with the processing of the new application. If that is the case, proceed to modify the permits and ensure that the modifications are complete before the new permit is issued. If the modification of all existing permits is not possible in a timely manner, advise the applicant of the situation and offer the applicant the option to withdraw the application (with refund). If the application is not withdrawn, then include documentation and initiate the process to deny the permit application. Such denial means that the proposed facility would be eligible for permitting but conditions beyond its control (the implementation of the TMDL by including it in all relevant permits) preclude the department from issuing the permit by federal regulation at this time. Upon the completion of the implementation of the TMDL (i.e., including the appropriate limits in other permits), the

application could resume processing. It is not necessary that the other permits attain compliance with the TMDL based limits before new permits are issued, only that the schedules for accomplishing that are established in the existing permits. New permits could be issued even if the TMDL or other permits were appealed.

If a TMDL is in the process of being included in all other permits, but those permits are not yet issued, the same TMDL could be proposed for incorporation into the new permit. However, the new permit could not be issued until permits for the other existing dischargers are reissued with compliance schedules. It is also preferred to issue and reissue all of these permits such that they share the same expiration date so that future actions can be accomplished on a watershed wide basis. In fact, it may be well worthwhile to begin synchronizing the expiration dates of permits in all watersheds where TMDLs will be needed so that modifications can be accomplished with a minimum of administrative work.

In some cases, an enforcement agreement, instead of a permit modification, may be used to establish a TMDL compliance schedule on existing discharges.

7. Where a TMDL is completed without any pending permit application, all permits in that watershed will be reviewed to make sure they are consistent with the TMDL, and revised as needed. This action is best accomplished by proposing all modifications needed within a given watershed simultaneously, preferably by revoking and reissuing the permits such that they share the same expiration date so that future actions can be accomplished on a watershed wide basis.